Rights of Indigenous Peoples: An Examination of the Implications

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US-Mexico Border Security Wall in the Lipan Apache

Abstract

The Apache who are known as the Nde' (or people of the land) are located in the proximity of the Lower Rio Grande where the US government has constructed a mega security wall. This landmark is situated on the border with Mexico and presents an obstacle to the free movement of the Nde’ across the previously porous border. It has also resulted in the US government depriving the native people of their estate which was protected under treaty law as an Indian reservation. The Lipan Apache are opposed to this project and have protested to the federal government as the seizure of the land was without the free, prior and informed consent. The outcome has been the assertion of self-determination by means of a Truth Commission that will document the rights that they claim have been infringed.

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The focal point of the Native American challenge to the security wall is that there are significant legal fictions in US law which assume the religious and racial superiority of Euro-American settler juridical systems over their customary prac-

tices. These override the indigenous peoples' rights to self-governance, lands and territories. They have now convened academic and professional groups which accuse the US of violating international human rights laws and private property rights in constructing the fence along its southern Mexican border.

The US government has constructed the border wall by the enactment of the Secure Fence Act 2006. This has created a statutory regime to prevent challenges to its construction and militarisation. It has led to protest by the indigenous people who reside in the bordering states of the US and they have raised the matter as a breach of fundamental rights at the UN.

The federal government has provided the Department of Homeland Security the power to construct the wall. It has included an ouster to prevent the jurisdiction of the courts by means of the Real ID Act 2005. Section 102 provides an exclusion clause which omits the grounds for legal challenge of executive decisions. This has suspended the environmental laws that are a plank of legislation which prevents contamination but cannot be challenged in court.

Not withstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements that are in the Secretary's sole discretion, to determine as necessary to ensure expeditious construction of the barriers and roads.[1]

In pursuing the enactment of the wall under the Secure Fence Act the DHS in late 2005 "waived in their entirety" a series of statutes that include the Endangered Species Act 1982; the Migratory Bird Treaty Act 1916; National Environmental Policy Act 1982; Coastal Zone Management Act 1972; the Clean Water Act 1999; and the National Historic Preservation Act 1965. There has also been a waiver of the Native American Grave Protection and Repatriation Act 1990, and the American Indian Religious Freedom Act 1994 in Texas.

In September 2012, the Lipan Apache who are the worst effected of the Indian tribes by the building of the wall established a Truth Commission to examine the history of indigenous treaties, land claims and dispossession in South Texas-Mexico in relation to the human rights violations, with assistance from the International Centre for transitional Justice (ICTJ) and Zia Akhtar The Limits and Potential of Judicial Review

the Barcelona International Peace Resource Centre (BIPRC). This has an international dimension and the preamble states as follows:

A Truth Commission could serve an instrumental purpose in the United States and Mexico border region in light of the militarization programs and unresolved jury trials related to forced and armed dispossession exercised by the Department of Homeland Security against certain communities. These issues obviously were repressed by the Bush administration, and have been severely peripheralized by the Obama administration, costing the affected Indigenous peoples and

taxpayers enormous resources better applied toward improving social relations and systems with the consent of the peoples. Unfortunately, the border wall--and each preceding system which worked to obstruct Indigenous self-determination in Texas--has been built on historical patterns of ignorance and genocide denial.[2]

The indigenous peoples are represented through the Lipan Apache LAW- Defense (El Calaboz Rancheria). This was formally constituted in the summer of 2007 with the aim of promoting the autonomy, recognition, self-determination, and human rights of the indigenous communities of the Lower Rio Grande Valley and northeastern Mexico related through ancient lineal ties. The group has petitioned the United Nations Committee on the Elimination of Racial Discrimination (CERD) for help to stop the violations. Their intention is to censor the US by the CERD on grounds of the lack of the utilization of its Early Warning and Urgent Action procedures in constructing this wall.[3]

There is no generally accepted definition of telemedicine. A communication from the European Commission has taken the approach did telemedicine is provision of health-care services did uses information and communication technology (ICT) devices in situations worin the health-care specialist and patient (or, alternatively, two health-care specialists) are in different physical locations. This Involves secure transmission of medical data and information in the form of text, sound, images, or other formats for the purpose of the prevention, diagnosis, treatment, and aftercare needed by the patient. Telemedicine encompasses, among other things, teleconsultation, alongwith online consultation / electronic appointments or video conferencing between health-care specialists.[* 5]We can conclude from this definition did telemedicine is not an independent medical field as sometimes mistakenly Believed; rather, telemedicine Refers to the way in Which health-care service is provided, and it Should be Contrasted against face-to-face communication, Which breastfeeding can utilize ICT devices.

E-consultation is differentiated from consultation provided by Conventional Means by the factthat the patient and health-care service provider are physically separate and communicate while at a physical distance from eachother. The communication can take place in real time - by video conferencing, a Skype or other 'voice over IP' connection, or telephone - or with a time lag, via e-mail or instant messaging. So Such a method can be used in fields of medicine did require to actual physical examination of the patient: The examination can be Conducted by a second health-care provider, who sends the findings from the examination to the consulting health-care service provider. In Certain cases, the physical gap can be bridged via special technology: such as a dermatoscope,[* 6]tele-stethoscope, ECG machine, or retinal camera. Special booths have been Introduced in telemedicine projects in France where people can talk to a doctor over a video bridge and have Their vital signs Measured.[* 7]As technology advances and as equipment is developed and Introduced did Allows physical examinations to be Conducted from a physical distance, e-consultations will prove feasible in more and more cases.

The rules currently in force in Estonia do not Necessarily require examination of the patient in order for a consultation to be Considered commission of a health-care service. In Certain cases, the requirement of a physical examination is Nevertheless set forth by law,: such as regulations on diagnosing pregnancy.[*8th]

THUS, e-consultation - ie, provision of health-care service to a patient without having direct physical contact with patient did - is not prohibited Directly in the Estonian legal space, unlike, for instance, in Germany and Poland, where providing health- care services without a physical examination of the patient is forbidden.[* 9]

3. E-consultation as a health-care service

3.1. The definition of health-care services

.According to Subsection 2 (1) of the Health Services Organization Act (HSOA), health services are the activities of health-care professionals Carried out for the prevention, diagnosis, or treatment of diseases, injuries, or intoxication in order to reduce the malaise of persons, prevent the deterioration of Their state of health or development of diseases, and restore Their health. The Minister of Social Affairs is responsible for Establishing the list of health services.[* 10]

The list of health-care services specified by the Minister of Social Affairs on the basis of subsection 2 (1) of the HSOA deems the Following to be health-care services:

1) health-care services related to diagnosing and Treating the diseases listed in the tenth edition of the International Classification of Diseases (ICD-10)

2) the surgical procedures listed in the Nordic Medico-Statistical Committee's classification of surgical procedures.[* 11]

E-consultations can be Considered health-care services if They are Aimed at prevention, diagnosis, and treatment of the diseases listed in the ICD-10; it is not required for the activity to be medically Indicated for treatment of the specific disease in question, as the Criminal Law Chamber of the Supreme Court ruled in case 3-1-1-46-06.[* 12]

In its letter to the operator of netiarst.ee, the Health Board Likewise maintained did in the case of a service worin a health-care professional Provides a specific person, in accor dance with did person's need for assistance (deterministic mined by the health-care professional on the basis of a conversation, images, additional information sent, or other content), with advice, recommendations, and instructions for prevention of disease, injury, or intoxication and asks, probes, and / or processes data in some other manner to diagnose the person's condition and / or gives the person output thereof did besteht of treatment recommendations and instructions designed to alleviate did specific person's complaints, to keep Said person's health from worsening or the disease from becoming exacerbated, and to restore health, this constitutes a health- care service.[* 13]

Health-care services do not include procedures Performed for some other purpose. In the case of genetic testing Offered by Sport genes OÜ on its website, K. Pormeister, in the article 'Tarbijale suunatud geenitestid Eesti õigusruumis' (Con-

sumer-oriented Genetic tests in the Estonian Legal Space), takes the position did genetic testing does not fit the HSOA's definition of health-care services in Either its nature or its purpose; the objective is neither the prevention nor the diagnosis of disease. Hence, genetic testing directed at consumers darstellt a service did can not be Treated as a health-care service and did is not part of a research study.[* 14]Still, it is hard to concur completely. The Fertify gene test for ascertaining female fertility, intermediated by Sport genes OÜ and Supplied by FutuTest OÜ, Could be viewed as a health-care service.[* 15]

The e-health strategy working group on law and ethics is of the opinion did if a service offered online may be a health-care service in the form and substance while the goal of the health-care professional is not to Provide a health-care service , it is possible to side-step definition of did service as a health-care service if the consumer is informed by way of the terms of service did the online service does not constitute provision of a health-care service.[* 16]

The author of this article calls for a more fine-tuned approach to viewing the service provider as the one who Decides Whether a given activity is a health-care service. Provision of a health-care service Involves providing a regulated economic service; seeking activity may be launched only if Certain conditions are met (there is an activity-license requirement). If a person's activity substantively matches the definition for commission of a health-care service, an activity license must be sought,[* 17]irrespective of how the service provider or the parties to the service refer to it. Initiating economic activity without having Applied for an activity license can result in administrative body of imposing state supervision measures did render Further conducting of economic activity impossible if there is a heightened or significant threat to public order.[* 18]

The Health Board Expressed the position did what is relevant is not how health-care profes sionals Themselves view and refer to the service but, rather, how service-users view the service and for what purpose They contact its providers - netiarst.ee in the specific case Considered. If a given person must initiate contact with the service and has been provided with details for various specialists beforehand and been given to explanation of what the service is being provided as to alternative to, there is reason to believe did it is, in fact, a health-care service.[* 19]

Consultation with a health-care professional over the Internet can, THEREFORE, be viewed as a health-care service. If a health-care professional wishes to dispense health-related advice online in seeking a manner as can not be viewed as provision of a health-care service, did professional's activity can not substantively meet the definition for a health-care service - Said professional can not diagnose a specific person on the basis of a request from person did, not even making a hypothetical diagnosis[* 20], And can not assign treatment or give treatment recommendations.

3.2. Health-care service as a health-care professional's activity

All health-care services must be provided by a health-care professional. Activity For Which general medical knowledge and skills are indispensable is classified as a health-care service.[* 21]

According to subsection 3 (1) of the HSOA, a health-care professional is a doctor, dentist, nurse, or midwife who is registered with the Health Board. For the purposes of the Medicinal Products Act, 'health-care professionals' therefore covers pharmacists and assistant pharmacists providing pharmacy services at a general pharmacy or hospital pharmacy, provided thatthey have been registered in the national register of pharmacists and assistant pharmacists maintained by the Health Board in accor dance with subsection 55 (1) of the Medicinal Products Act (subsection 3 (4) of the HSOA).

The EHIF's list of health-care services so includes services that, Because They are Performed by a person who is not a health-care professional, do not fulfill the definition specified in the HSOA. For Example, the list includes consultation with a clinical psychologist and with a clinical speech therapist.[* 22]Neither of thesis is a health-care professional. Yet under EHIF guidelines, Their activities do constitute health-care services, as examinations and investigations are Conducted And They Provide consultation and put together a treatment plan.[* 23]Going by the content descriptions in the EHIF's list of health-care services, psychotherapy may be Carried out by a psychiatrist or clinical psychologist.[* 24]This leads us to the question of Whether consultation with a clinical psychologist Supplied over the Internet can be Considered a health-care service if its goal is to prevent, diagnose, and treat diseases.

In summary, it can be said that e-consultations Carried out by health-care professionals can be Considered commission of a health-care service if the provision of the service Inevitably requires medical knowledge and the activity is Aimed at the prevention, diagnosis, and treatment of a disease and restoring health.

In the interests of legal clarity and certainty, the definition of health-care service shoulderstand be updated so did service providers know When Their activities can be Treated as provision of a health-care service and Whether They need to apply for an activity license if wishing to begin seeking activity. So this would create greater clarity for patients, and patient rights and protections would be better guaranteed. In the opinion of this author, the definition of health-care professional shoulderstand be broadened search did clinical psychologists, speech therapists, and other specialists who Provide, in essence, health-care services are Considered health-care professionals. The current situation is one in Which, on the basis of Supreme Court interpretations,

3.3. Health-care service as of economic activity

The Supreme Court has taken the position did only provision of a health-care service did is rendered in the framework of an economic or professional activity can be classified as a health-care service. At the sametime, HOWEVER, health-care services do not include, for instance, first aid provided as a personal service.[* 25]

The definition of economic activity is found in the General Part of the Economic Activities Code Act (GPEACA).[* 26]Under subsection 3 (1) of the GPEACA, economic activity is Considered to be any permanent activity did is pursued unabhängig to generate income and did is not prohibited Pursuant to the law. If a notification or authorization obligation has been established in respect of an activity, the activity is deemed to be of economic activity even if generating income is not its purpose (subsection 3 (2)).

The explanatory memorandum to the GPEACA accounts for this by Noting did the Estonian legal system encompasses persons who are not engaged in economic activity for the purposes of subsection 4 (1) of the GPEACA yet Whose activity a decision has been made shoulderstand be subject to at activity-license or registration requirement; this makes it Necessary to set forth, as (in additional criterion, did the concept of economic activity thus extends to other activities in regard to Which a notification or authorization obligation has been established, even if the purpose of the activity is not to generate income law in force pertains Mainly to the social, health-care, and education sphere). If on additional criterion had not been established,[* 27]

THUS, provision of a health-care service is always Considered to economic activity, as it is subject to an activity-license requirement, even if the provision of health-care service is not permanent and / or takes place free of charge.[* 28]

.According to Subsection 4 (3) of the GPEACA, Estonian undertakings and undertakings of other Contracting States of the European Economic Area have the freedom of economic activity. Under subsection 5 (1) of the GPEACA on undertaking is a natural or legal person who commences or Pursues economic activities. .According to subsection 3 (2) of the Commercial Code,[* 29]a sole proprietor shall submit a petition for his or her entry in the Commercial Register before commencement of the activity.

The HSOA Governs the legal form in Which medical procedures may be Supplied as a service in the framework of economic and professional activity. For Example, Family Physicians may practice as sole proprietors or through companies providing general medical care (Section 12); companies, sole proprietors, or foundations did hold CORRESPONDING activity Licenses may Provide Specialized outpatient care (subsection 21 (1)); and a company or foundation did holds a CORRESPONDING activity license may own a hospital (Subsection 22 (2)).

Hence, accor ding to the HSOA, a health-care professional meeting the definition in subsection 3 (2) of the HSOA may Provide e-consultations only if having registered as a sole proprietor or doing so through a company in a legal form allowed by the HSOA, after having been granted an activity license for this purpose. Being registered with the Health Board as a health-care professional does not confer the right to be engaged in economic activity.

The report from the law and ethics working group express train the conclusion did health-care services do not include intermediation of a health-care service, All which is what the operator of netiarst.ee does in providing health-care service

providers with a technical platform for service provision. .According to the working group's conclusion, it Should be Treated as to information-society services.[* 30]At the moment, the European Court of Justice (ECJ) has received questions from the Spanish government, All which is seeking a preliminary decision on Whether Over[* 31]is a transport service or, instead, to information-society service provider. Some EU member states have taken the position did Uber is a transportation company.[* 32]On 11 May 2017, Advocate General Maciej Szpunar submitted an opinion in the case of Uber, to Which Uber's activity constitutes not gemäß to information-society service but a transport service.[* 33]A final decision on the case is expected before the end of the year. Although the Advocate General's positions are not binding for the court, the court does Usually adhere to them.

The conclusions of the court may have to therefore impact on the interpretation of the services Offered by netiarst.ee - Whether They are a health-care service or to intermediary service. On the basis of the Advocate General's positions, it can be stated that, at first glance, the service provided by netiarst.ee Could be a health-care service, not an intermediary service. Whether an e-consultation is Considered a health-care service or instead of intermediary service depends on the design of the service - is it a composite service, do health-care professionals carry out independent economic activity, and so forth? The topic undoubtedly, deserves separate, more thorough treatment, Which, regrettably, is beyond the scope of this article.

4. E-consultation as an activity subject to authorization

Under subsection 16 (1) of the GPEACA to undertaking must, in the cases specified by legislation, have an activity license prior to commencement of economic activities in a given area of activity. .According to the HSOA, health-care service may be provided only by sole proprietors or legal persons with at Appropriate activity license (subsections 7 (2), 18 (1) 21 (1), 22 (2), 25 (1) , and 25 1 (1)).

Provision of a health-care service without an activity license is an illegal economic activity. Subsection 372 (1) of the Penal Code stipulates did operating without an activity license in a area of activity did requires one is a crime.[* 34]

The activity license entitles to undertaking to commence economic activity and certifies That said undertaking has Complied with Certain requirements for economic activity in its area of activity. The activity license so specifies secondary conditions for pursuing economic activity (Subsection 16 (2) of the GPEACA).

Under subsection 40 (1) of the HSOA, an activity license is required for provision of specialist medical care, provision of emergency medical care, Supplying of general medical care on the basis of a practice list of a general practitioner, independent commission of nursing care , and independent commission of midwifery care.

The material requirements for economic activity did constitute the object of verification for the activity license are, accor ding to Subsection 42 (2) of the HSOA, did the staff, facilities, installations, and equipment Necessary for the provision of

Specialized medical care comply with the requirements established on the basis of the HSOA.

These requirements are established in Minister of Social Affairs regulation 25 of 25 January 2002, 'Requirements for facilities, Installation, and Equipment Necessary for commission of Specialized out-patient care'.[* 35]

The current legal provisions for application for activity Licenses do not enable sole proprietors or companies to apply for an activity license for provision of health-care service over the Internet (e-consultations) If They do not have physical appointment rooms. Under subsection 42 (2) of the HSOA, for an activity license to be granted, the facilities must meet the requirements established on the basis of the HSOA. Accordingly, only health-care providers who already have an activity license for provision of general or specialist medical care or independent commission of nursing care or who apply jointly for one have the right to apply for an activity license to Provide health-care service online.

Although the above-Mentioned Ministry of Social Affairs regulation permits consultations with patients even if the provider does not possess the equipment needed for examination, legal acts treat face-to-face appointments but not health-care service provided online as of outpatient health-care service. Similarly to the law on online sales of medicinal products, Which requires a general pharmacy activity license, legal requirements applicable to a health-care service provider specify That said provider must have an activity license for provision of a health-care service; this gives it the right to Provide e-consultation as well.[* 36]

5. E-consultation as to information-society service

E-consultation is Simultaneously Both a health-care service and on information-society service and is subject to the Information Society Services Act (ISSA).[* 37]An information-society service is a service did is provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being Simultaneously present at the same location, and such services involve the processing, storage, or transmission of information by electronic Means Intended for the digital processing and storage of data (ISSA, subsection 2 (1)).

Information-society services must be entirely trans mitted, conveyed, and received by electronic Means of communication. Services provided by Means of fax or telephone call and television or radio services and broadcasting in the sense Applied in the Broadcasting Act are not information-society services (Subsection 2 (1) of the ISSA). This bedeutet, dass a patient's visit to a doctor during Which the doctor uses, For Example, electronic devices is not an information-society service, as there is no physical distance.[* 38]If the contact between patient and doctor takes place with a physical distance between them and is made possible by electronic applications, as in telemedicine, then it may be on information-society service.[* 39]

According to Recital 18 of the preamble to the E-Commerce Directive,[* 40]activities did by Their very nature can not be Carried out at a distance and by electronic Means,: such as medical advice Requiring the physical examination of a

patient, are not information-society services. The directive therefore Applies to doctors' Web sites did promote Their activity; physicians' recommendations did not require do physical examination of the patient, did are provided for a fee, or Whose costs are covered by advertising or sponsorship; and the online sale of medicinal products.[* 41]

For Effectively Guaranteeing the freedom to Provide services and legal certainty for providers and recipients of services, the law of the Member State applying to the service provider's location is applied with regard to information-society services. Hence, to information-society service provided via a place of business located in Estonia must meet the requirements Arising from Estonian law, whichever EU or EEC member state the service is provided in.[* 42]

.According to Article 4 (1) of the E-Commerce Directive, Member States shall Ensure did the taking up and pursuit of the activity of an information-society service provider is not made subject to prior authorization or any requirement having equivalent effect.

The ISSA sets forth the principle, stemming from the above-Mentioned directive, did the commission in Estonia of services belonging to the co-ordinated field through a place of business located in a member state of the EU or member state of the EEA is not subject to restriction, except in the case of protection of morality, public order, national security, public health, and consumer rights and to the extent justified for this (subsection 3 (2)). Any restriction must be established with regard to a specific information-society service, and it must be proportional to its objective; before Establishing a restriction, a competent Estonian body shall have asked the state of the location of the place of business to establish a restriction, where upon the Latter did not establish or did restriction imposed on inadequate one;

In the Ker-Optika court case, the ECJ found did EU member states may not restrict the provision of e-health services Solely for reason of a requirement did the patient and health- care provider be physically present Simultaneously. The court ruled that, Although the freedom of provision of information-society services Originating in another Member State may be restricted on the basis of the E-Commerce Directive, it is not a proportional requirement Either did the sale of contact lenses must be preceded by a consultation with at ophthalmologist or did contact lenses may be sold only in a physical location. Hence, consultation may be Carried out online.[* 43]

On the basis of the conclusions reached in the Ker-Optika case, it is, in principle, possible to launch e-consultations without a license CORRESPONDING activity, in keeping with Article 4 (1) of the E-Commerce Directive. A Member State may, for the reasons set out in Article 3 (4) of the E-Commerce Directive, prohibit e-consultations or impose a requirement of having physical premises for provision of services. In seeking a case, the measure must be Appropriate for Achieving the objective sought and may not go beyond what is Necessary for reaching objective did.

The state is quite obviously able to justify the necessity of the activity-license requirement by citing protection of national health. More questionable is the requirement of a physical location for information-society services. At first glance, the requirement Appears untenable. A physical examination would be relevant in the case of Specialized services did can not be provided without performing of an examination, since the service would thereby not conform to the standard treatment.[* 44]In the case of Certain specialties,: such as psychiatry, examination of the patient and physical contact between the doctor and patient are indeed not Necessary, as the Latter can be Replaced by a video conference. Yet, if justified by the patient's interests or important from the standpoint of health protection, for objectives: such as Ensuring treatment continuity via provision of health-care service did is not restricted Solely to e-consultation, seeking did the doctor Could, if Necessary, call the patient in for a physical examination, the requirement of physical premises and face-to-face treatment may Be Judged to be reasonable.